BEFORE THE APPEALS BOARD
FOR THE
KANSAS DIVISION OF WORKERS COMPENSATION

RONALD L. FREED Claimant VS. **EAGLE SUPPORT SERVICES, INC.** Respondent AND **NEW HAMPSHIRE INSURANCE CO.** Insurance Carrier	)	Docket No. 1,052,101

ORDER

STATEMENT OF THE CASE

Claimant requested review of the November 23, 2010, preliminary hearing Order entered by Administrative Law Judge Rebecca Sanders. Jeff K. Cooper, of Topeka, Kansas, appeared for claimant. Michael R. Kauphusman, of Overland Park, Kansas, appeared for respondent and its insurance carrier (respondent).

The Administrative Law Judge (ALJ) found that claimant's accidental injury did not arise out of and in the course of his employment and, therefore, denied claimant's request for preliminary benefits.

The record on appeal is the same as that considered by the ALJ and consists of the transcript of the November 23, 2010, Preliminary Hearing and the exhibits, together with the pleadings contained in the administrative file.

ISSUES

Claimant contends he suffered an accidental injury to his low back and legs on July 26, 2010, while working for respondent. He argues this accident resulted in an aggravation, acceleration and intensification of his preexisting low back condition, which is a personal injury within the meaning of K.S.A. 2010 Supp. 44-508(e). Claimant asks that the ALJ's Order be reversed and the respondent be ordered to provide him with medical treatment and temporary total disability benefits as requested.

Respondent asserts the ALJ correctly determined that claimant failed to meet his burden of proving he suffered personal injury by accident arising out of and in the course of his employment. Accordingly, respondent asks that the ALJ's Order be affirmed.

The issue for the Board's review is: Did claimant suffer an accidental injury that arose out of and in the course of his employment with respondent?

FINDINGS OF FACT

Claimant worked for respondent as a van/bus driver transporting troops from Fort Riley to and from training sites and airports. On July 26, 2010, claimant was exiting a 15-passenger van. Claimant said he was in a back seat of the van. He was not able to stand up and exit normally out of the van. He had to turn to the right, bend over from the waist, and slide off the seat to the ground. When his feet touched the ground, he propelled himself upright. As he did so, he felt a twinge in his lower back on the left side that radiated into his buttock and down his left leg. He testified there was nothing unusual about the ground that he noticed when he got out of the vehicle. He did not roll his ankle or strike the ground particularly hard. The surface of the ground where he exited the vehicle was even and paved. Both his feet hit the ground at the same time.

Claimant was able to walk the pain off and was without pain the rest of the day. He continued to work. The next morning, claimant was fixing his breakfast when he felt pain from his left hip to his foot. The pain was not located in the same area of his back where he had felt the twinge the day before but was concentrated strictly in his left hip, leg and foot. The twinge the day before was higher in his back.

On or about July 28, 2010, claimant was having considerable pain and went to the VA Hospital.[1] He said he wanted to be sure that the pain he was experiencing was not related to his service-related back injury. Claimant had suffered a compression fracture at the T-12 or L-1 area of his spine in 1972 while serving in the military. He has had constant low back and leg pain since that time. He received an honorable discharge in 1985, at which point he started receiving a military disability for chronic low back pain and leg pain. In 2003, he began taking Hydrocodone for pain. He has been taking that medication constantly since 2003, up to three or four a day. In 2004, claimant was having complaints of lower back pain and leg pain. An MRI was taken, and he was diagnosed with spinal stenosis.

Claimant reported the July 26, 2010, injury to respondent on August 2, 2010, and was sent by respondent to see Michael Beffa, a physician's assistant, at Geary Occupational Health Services that day. Claimant complained of pain in his left buttock down to his foot. Mr. Beffa diagnosed him with left sciatic pain. He told claimant to use

[1] P.H. Trans., Cl. Ex. 1 at 1.

crutches when walking and restricted him to no prolonged standing or walking. Claimant notified respondent of those restrictions. He was not provided work after that time. Claimant's last day of work at respondent was July 28 or 29, 2010.

Claimant was examined by Dr. Christian Lothes, a neurosurgeon, on September 22, 2010, after having been referred by Dr. Benjamin Stephenson of the VA Hospital. Dr. Lothes noted that an MRI dated August 12, 2010, indicated that claimant had fairly severe spinal stenosis at the L4-L5 level, as well as facet arthropathy at L5-S1. Dr. Lothes opined: "I think that his symptoms are largely the result of his severe spinal stenosis and neural foraminal narrowing at the L4-L5 level."[2]

Claimant was examined by Dr. Pedro Murati on October 12, 2010, at the request of claimant's attorney. Claimant gave Dr. Murati a history of sustaining an injury on July 26, 2010, as he was getting out of a van. He reported he felt a twinge in his low back that was not painful and that was gone an hour later. But the pain returned and has not gotten better. After examining claimant, Dr. Murati diagnosed him with aggravation of his low back pain secondary to multiple degenerative disk disease. He further stated: "This claimant's current diagnoses are within all reasonable medical probability, a direct result from the work-related injury that occurred on 07-26-2010, during his employment with [respondent]."[3]

Claimant testified that before July 26, 2010, he had some back pain, but he was able to work full time. His job at respondent required him to sit for long periods of time, and also to stand for periods of time. He did not miss any work at respondent due to his back or legs in the three years he worked there. Claimant stated that the pain he now has in his back is more severe than what he ever had before July 26, 2010. He can now only walk for short distances. He has problems sitting for periods of time. Claimant believes that sliding off the seat of the van and hitting his feet on the ground on July 26, 2010, is what caused the severe pain he is suffering in his back and legs.

PRINCIPLES OF LAW

K.S.A. 2010 Supp. 44-501(a) states in part: "In proceedings under the workers compensation act, the burden of proof shall be on the claimant to establish the claimant's right to an award of compensation and to prove the various conditions on which the claimant's right depends." K.S.A. 2010 Supp. 44-508(g) defines burden of proof as follows: "'Burden of proof' means the burden of a party to persuade the trier of facts by a preponderance of the credible evidence that such party's position on an issue is more probably true than not true on the basis of the whole record."

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[2] *Id.*, Cl. Ex. 3 at 10.

[3] *Id.*, Cl. Ex. 2 at 3.

An employer is liable to pay compensation to an employee where the employee incurs personal injury by accident arising out of and in the course of employment.[4] Whether an accident arises out of and in the course of the worker's employment depends upon the facts peculiar to the particular case.[5]

The two phrases arising "out of" and "in the course of" employment, as used in the Kansas Workers Compensation Act, have separate and distinct meanings; they are conjunctive and each condition must exist before compensation is allowable.

> The phrase "out of" employment points to the cause or origin of the accident and requires some causal connection between the accidental injury and the employment. An injury arises "out of" employment when there is apparent to the rational mind, upon consideration of all the circumstances, a causal connection between the conditions under which the work is required to be performed and the resulting injury. Thus, an injury arises "out of" employment if it arises out of the nature, conditions, obligations, and incidents of the employment. The phrase "in the course of" employment relates to the time, place, and circumstances under which the accident occurred and means the injury happened while the worker was at work in the employer's service.[6]

An accidental injury is compensable under the Workers Compensation Act even where the accident only serves to aggravate a preexisting condition.[7] The test is not whether the accident causes the condition, but whether the accident aggravates or accelerates the condition.[8] An injury is not compensable, however, where the worsening or new injury would have occurred even absent the accidental injury or where the injury is shown to have been produced by an independent intervening cause.[9]

K.S.A. 2010 Supp. 44-508(e) states:

> ''Personal injury'' and ''injury'' mean any lesion or change in the physical structure of the body, causing damage or harm thereto, so that it gives way under the stress of the worker's usual labor. It is not essential that such lesion or change be of such character as to present external or visible signs of its existence. An injury

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[4] K.S.A. 2010 Supp. 44-501(a).

[5] *Kindel v. Ferco Rental, Inc.*, 258 Kan. 272, 278, 899 P.2d 1058 (1995).

[6] *Id.* at 278.

[7] *Odell v. Unified School District*, 206 Kan. 752, 758, 481 P.2d 974 (1971).

[8] *Woodward v. Beech Aircraft Corp.*, 24 Kan. App. 2d 510, Syl. ¶ 2, 949 P.2d 1149 (1997).

[9] *Nance v. Harvey County*, 263 Kan. 542, 547-50, 952 P.2d 411 (1997).

> shall not be deemed to have been directly caused by the employment where it is shown that the employee suffers disability as a result of the natural aging process or by the normal activities of day-to-day living.

The Kansas Supreme Court, in *Boeckmann,*[10] denied workers compensation benefits, holding that

> physical disability resulting from a degenerative arthritic condition of the hips which progressed over a period of years while the workman was employed is not compensable as an accident arising out of and in the course of his employment under the circumstances found to exist in the instant case.

Among the circumstances the court found to exist was that Mr. Boeckmann's disabling arthritis existed before his employment with Goodyear and that "the degenerative process will continue to progress long after his retirement."[11] The medical testimony was

> that Mr. Boeckmann's hip problems, or the disabilities arising therefrom, were [not] caused by his work at the Goodyear plant; that his employment did not cause his condition to occur; that the hip condition had been a progressive process; that increased activity was liable to aggravate the claimant's underlying problem but that almost any everyday activity has a tendency to aggravate the problem; that every time the claimant bent over to tie his shoes, or walked to the grocery store, or got up to adjust his TV set there would be a kind of aggravation of his condition. . . .
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> . . . The examiner found, on what we deem sufficient evidence, that any movement would aggravate Boeckmann's painful condition and there was no difference between stoops and bends on the job or off.[12]

Similarly, in *Martin,*[13] the Kansas Court of Appeals held that "[i]njuries resulting from risk personal to an employee do not arise out of his employment and are not compensable."

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[10] *Boeckmann v. Goodyear Tire & Rubber Co.*, 210 Kan. 733, Syl., 504 P.2d 625 (1972).

[11] *Id.* at 736.

[12] *Id.* at 738-39.

[13] *Martin v. U.S.D. No. 233*, 5 Kan. App. 2d 298, Syl. ¶ 3, 615 P.2d 168 (1980).

More recently, the Kansas Court of Appeals in *Johnson*[14] held:

> In an appeal from the final order of the Workers Compensation Board awarding compensation for an injury suffered by an employee at the workplace, under the facts of this case substantial evidence did not support the board's finding that the employee's act of standing up from a chair to reach for something was not a normal activity of day-to-day living.

The court found it significant that "Johnson had a history of three or four [prior] incidents of left knee pain. Her treating physician, Dr. Jennifer Finley, testified that '[i]t looks like she had had years of degeneration and had some previous problems, and it was just a matter of time.'"[15]

In *Anderson*,[16] the Kansas Court of Appeals held claimant's repetitive trauma injury compensable even though the offending activity was also performed apart from the employment because the employment required claimant to perform the activity and more frequently than what claimant would do away from work.

By statute, preliminary hearing findings and conclusions are neither final nor binding as they may be modified upon a full hearing of the claim.[17] Moreover, this review of a preliminary hearing order has been determined by only one Board Member, as permitted by K.S.A. 2010 Supp. 44-551(i)(2)(A), as opposed to being determined by the entire Board as it is when the appeal is from a final order.[18]

ANALYSIS

Claimant relates his increased back and leg pain to the July 26, 2010, incident at work when he was exiting the van. By history, the treating physicians show this event as the precipitating factor. But the record compiled to date contains only one expert medical opinion that specifically addresses causation. Dr. Murati diagnosed claimant's condition as an "[a]ggravation of low back pain secondary to multiple degenerative disk disease" and opined: "This claimant's current diagnoses are within all reasonable medical probability,

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[14] *Johnson v. Johnson County*, 36 Kan. App. 2d 786, Syl. ¶ 3,147 P.3d 1091, *rev. denied* 281 Kan. __ (2006).

[15] *Id.* at 788.

[16] *Anderson v. Scarlett Auto Interiors*, 31 Kan. App. 2d 5, 61 P.3d 81 (2002).

[17] K.S.A. 44-534a; see *Quandt v. IBP*, 38 Kan. App. 2d 874, 173 P.3d 1149, *rev. denied* 286 Kan. __, (2008); *Butera v. Fluor Daniel Constr. Corp.*, 28 Kan. App. 2d 542, 18 P.3d 278, *rev. denied* 271 Kan. 1035 (2001).

[18] K.S.A. 2010 Supp. 44-555c(k).

a direct result from the work-related injury that occurred on 07-26-2010, during his employment with Eagle Support Services."[19]

Claimant has had constant back and leg pain since 1972. He has been taking Hydrocodone for that pain since 2003. On July 26, 2010, claimant felt a twinge in his back when he exited the van. The pain soon returned to its previous level, and claimant worked the remainder of the day without incident. The next morning, claimant experienced another incident of increased pain at home. This pain was not in the same area of his back where he felt the twinge the day before at work. Claimant went to work and worked his regular job that day again without incident. Claimant also worked the following day, the 28th, and may have worked the 29th as well. Claimant did not seek medical treatment until on or about July 28, when he went to the VA on his own. He did not report a work-related accident or ask his employer for medical treatment until August 2.

Claimant's opinion and the causation opinion of Dr. Murati aside, it is difficult to relate claimant's worsened symptoms to the incident at work on July 26 when claimant was able to walk off those symptoms and continue working. It was not until the next day at home when claimant again experienced an increase of symptoms. But these increased symptoms were again temporary, and claimant was able to go to work. The increase in symptoms at home did not seem to be connected to any particular movement or activity. The trauma at work on July 26 appears to have been quite minor. Given claimant's long history of constant back and leg pain and the degenerative condition of his spine, it would seem likely that almost any activity could aggravate claimant's condition, as in *Boeckmann*. But no physician has given such an opinion, nor does it appear from this record that any physician was asked.

Nevertheless, the activity of exiting a passenger van is an activity of day-to-day living as contemplated by K.S.A. 2010 Supp. 44-508(e). It is similar to the act of standing up from a chair and reaching for something, as in *Johnson*. As such, claimant's injury was not directly caused by claimant's employment.

CONCLUSION

Claimant has failed to prove that he sustained personal injury by accident arising out of his employment with respondent. Rather, claimant suffered injury and disability as a result of the natural aging process and by the normal activities of day-to-day living.

[19] P.H. Trans., Cl. Ex. 2 at 3.

ORDER

WHEREFORE, it is the finding, decision and order of this Board Member that the Order of Administrative Law Judge Rebecca Sanders dated November 23, 2010, is affirmed.

IT IS SO ORDERED.

Dated this _____ day of February, 2011.

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HONORABLE DUNCAN A. WHITTIER
BOARD MEMBER

c: Jeff K. Cooper, Attorney for Claimant
Michael R. Kauphusman, Attorney for Respondent and its Insurance Carrier
Rebecca Sanders, Administrative Law Judge